

UNITED STATES COURT OF APPEALS

FILED

DEC 14 2007

FOR THE NINTH CIRCUIT

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY 
DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

JAMES EDWARD LEE, aka Einstein,

Defendant - Appellant.

No. 05-10451

D.C. No. CR-02-05301-19-OWW

JUDGMENT


Appeal from the United States District Court for the Eastern District of California (Fresno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 07/13/07

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

DEC 12 2007
by: 
Deputy Clerk

FILED

JUL 13 2007

NOT FOR PUBLICATION

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

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MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Submitted July 9, 2007**

Before: LEAVY, THOMAS and BERZON, Circuit Judges.

James Edward Lee appeals from the 198-month sentence imposed following his guilty-plea conviction for conspiracy to sexually exploit minors by the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

production of sexually explicit material, in violation of 18 U.S.C. §§ 2251(a) and (d)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Lee contends that his sentence should be reduced because the government breached the parties' plea agreement. We review de novo whether the government breached the plea agreement, *see United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (per curiam), and determine that it did not. The government performed its obligation under the agreement by not seeking a sentence of greater than 210 months. Because the plain language of the plea agreement clearly and unambiguously gave the government sole discretion to file a motion for a substantial assistance departure, no breach occurred. *See United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). We reject Lee's contention, raised in the reply brief, that the government prevented him from fulfilling a condition of the agreement by interviewing him and seeking a departure based on his assistance prior to sentencing rather than after sentencing.

We decline to review Lee's ineffective assistance claim on direct appeal. *See United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003) (stating that ineffective assistance of counsel claims are generally more appropriately raised on collateral attack under 28 U.S.C. § 2255.)

AFFIRMED.

INTERNAL USE ONLY: Proceedings include all events.
05-10451 USA v. Lee

UNITED STATES OF AMERICA
Plaintiff - Appellee

David L. Gappa, Esq.
FAX 559/497-4099
559/497-4020
Ste. 4401
[COR LD NTC aus]
USF - OFFICE OF THE U.S.
ATTORNEY
2500 Tulare St.
Fresno, CA 93721

v.

JAMES EDWARD LEE, aka Einstein
Defendant - Appellant

Carolyn D. Phillips, Esq.
FAX 559/248-9820
559/248-9833
[COR LD NTC cja]
P.O. Box 5622
Fresno, CA 93755-5622